

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANET L. VANCE)	
Claimant)	
)	
VS.)	
)	
DCCCA, INC.)	
Respondent)	Docket No. 1,038,232
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

This matter is before the Board on remand from the Kansas Court of Appeals from its January 31, 2014, Memorandum Opinion. This case has been placed on summary docket for disposition without oral argument.

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations as set forth in its original Order of December 27, 2012, together with the January 31, 2014, Memorandum Opinion of the Kansas Court of Appeals.

ISSUES

The Kansas Court of Appeals concluded the Board incorrectly found claimant failed to prove her temporomandibular joint syndrome (TMJ) was caused by the work-related accident. Therefore, the Court of Appeals remanded this case to the Board with directions to modify the award of compensation by taking into account the TMJ syndrome caused by claimant's work-related accident.

Respondent argues, "Although the Court of Appeals has determined the TMJ syndrome is related to the work accident, it did not mandate a finding of permanent impairment as a result."¹ Respondent maintains the award of compensation of the Board's December 27, 2012, Order should stand.

Claimant argues she sustained a 5 percent permanent partial impairment to the body as a whole based on her TMJ, in addition to the 8.5 percent impairment to the left lower extremity for a 13 percent permanent partial impairment to the body as a whole. Moreover, claimant contends she is entitled to wage loss and work disability benefits as a result of her impairment.

The issue for the Board's review is: What additional compensation is due for claimant's work-related TMJ?

FINDINGS OF FACT

The Board adopts the factual and procedural overview set forth by the Court of Appeals and the Board's Findings of Fact as written in the Board's Order of December 27, 2012. This matter was originally before the Board on respondent's appeal of the June 29, 2012, Award of Administrative Law Judge (ALJ) Thomas Klein. In its Order of December 27, 2012, the Board disagreed with the ALJ and determined claimant was entitled to compensation only as it related to her left lower extremity. The Board found claimant failed to prove her dental and jaw problems were due to her work-related accident. Further, the Board determined claimant's low back and bilateral hip complaints were temporary and had resolved by April 2009. The Board found claimant proved a permanent injury to her left knee as a result of her work-related accident. The Board averaged the rating opinions provided by Drs. Bieri and Prostic and found claimant entitled to compensation for an 8.5 percent impairment of function to the left lower extremity.

The Court of Appeals, in its Memorandum Opinion of January 31, 2014, determined the Board erred in finding claimant's dentition and jaw injuries were not causally related to her work-related accident of February 7, 2007. The Court of Appeals found there is evidence in the record claimant was diagnosed with TMJ. Dr. Cornish, claimant's treating dentist, recommended treatment for some condition related to TMJ by the use of an occlusal splint. The Court of Appeals wrote:

Even if we were to diminish the significance of Dr. Cornish's diagnosis and recommended treatment because it was for "some condition related to" TMJ as opposed to TMJ itself, a diagnosis of TMJ was made by the other two testifying doctors as well: Dr. Bieri and Dr. Prostic. . . . Dr. Bieri concluded that [claimant] had achieved maximum medical improvement at that time and her impairments to the

¹ Respondent's Brief (filed May 27, 2014) at 1.

face were permanent. Thus, based on the AMA guidelines and the history as provided, he gave her a 5 percent whole person impairment for TMJ and loss of dentition. He said . . . he would attribute the injuries diagnosed and his impairment ratings to the accident at [respondent] on February 7, 2007. As discussed above, however, Dr. Bieri's opinions may not be considered reliable because he saw her after her November 2009 assault in which she was hit in the face and head. Furthermore, he saw [claimant] 3 years after the work-related accident, so he possibly was not in as good of a position to determine the cause of her jaw pain.

On the other hand, Dr. Prostic's testimony readily establishes a causal connection between [claimant's] TMJ and the work-related accident. . . . It was therefore his opinion that the injuries he diagnosed were caused or permanently aggravated by [claimant's] work-related injury.²

In addition, the record shows claimant presented evidence of sustaining an injury to her jaw and immediate jaw pain as a result of the work-related accident. The Court of Appeals determined the evidence demonstrated claimant consistently complained of jaw pain. Therefore, the Court of Appeals concluded "there is not substantial evidence to support the Board's finding" claimant failed to prove her jaw injuries were caused by the February 7, 2007, accident.³

The Court of Appeals affirmed the remainder of the Board's findings related to this case.

ANALYSIS

The Board has been directed to "modify the award of compensation by taking into account the TMJ caused by claimant's work-related accident."⁴ The only rating for TMJ was provided by Dr. Bieri. Dr. Bieri assigned a 5 percent functional impairment rating for TMJ and loss of dentition. Dr. Bieri did not apportion the rating for the two separate conditions. The Court of Appeals specifically found claimant's dental problems not compensable.

Three times in the Court of Appeals' Opinion, the Court found Dr. Bieri's opinions to be unreliable. The Court first stated, after noting the specifics of Dr. Bieri's impairment rating for claimant's jaw, "Dr. Bieri's evidence does not detract from the Board's finding

² *Vance v. DCCCA, Inc.*, No. 109,294 (Kansas Court of Appeals unpublished opinion filed January 14, 2014) at 17-19.

³ *Id.* at 19.

⁴ *Id.* at 23.

because it is not reliable.”⁵ Next, the Court stated, “Dr. Bieri’s testimony did not seriously undermine the Board’s finding that Vance failed to prove her dental problems were due to the work-related accident.”⁶ Finally, commenting on Dr. Bieri’s diagnosis and rating, the Court wrote:

He said that based on [claimant's] history and documentation, he would attribute the injuries diagnosed and his impairment ratings to the accident at [respondent] on February 7, 2007. As discussed above, however, Dr. Bieri’s opinions may not be considered reliable because he saw her after her November 2009 assault in which she was hit in the face and head.⁷

It is apparent from the Court of Appeals’ Opinion, Dr. Bieri’s opinions are not to be considered. As such, Dr. Bieri’s impairment rating will not be given any weight by the Board. Since no other physician provided an impairment rating for claimant’s TMJ, the Board must find claimant has failed to prove, more probably than not, she suffers a permanent impairment of function related to her TMJ.

However, based upon the mandate of the Court of Appeals, the Board finds claimant suffered an injury to her jaw, resulting in TMJ. The Court of Appeals adopted Dr. Prostic’s causation opinion and noted Dr. Prostic recommended a surgical consultation for the TMJ.⁸ Dr. Cornish also recommended treatment for claimant’s TMJ.⁹ The Board finds Claimant is entitled to medical benefits for TMJ and no other dental condition.

CONCLUSION

Claimant suffers from TMJ as the result of her injuries arising out of and in the course of her employment with respondent. Claimant failed to prove entitlement to compensation for permanent impairment for her TMJ. Claimant is entitled to medical compensation for TMJ.

⁵ *Id.* at 15.

⁶ *Id.* at 15-16.

⁷ *Id.* at 18.

⁸ *Id.*

⁹ *Id.* at 17.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 29, 2012, is modified to find claimant has an 8.5 percent scheduled injury to her left lower extremity at the level of the leg.

Claimant is entitled to 17 weeks of permanent partial disability compensation at the rate of \$483 per week in the amount of \$8,211 for a 8.5 percent loss of use of the left leg, making a total award of \$8,211, which is due and payable in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Thomas Klein, Administrative Law Judge